No. 86-1260

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioner,

—v.—

BALTIMORE ORIOLES, INC., ET AL.,

Respondents.

STEPHEN D. ROGERS, ET AL.,

Petitioners,

—v.—

BOWIE K. KUHN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Copyright Act of 1976 preempts the claims of professional baseball players to control the exhibition of copyrighted telecasts of Major League Baseball games in which the players are employed to perform, where the game telecasts are "works made for hire" owned by the Club employers under federal copyright law.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to petitioners' request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on October 29, 1986.[1]

1 The listing of all parent companies, subsidiaries and affiliates of any of the corporate respondents, pursuant to Rule 28.1 of the Court, is set forth in the Appendix hereto.

STATEMENT OF THE CASE

This case presents the question of who has the right to control the telecasts of Major League Baseball games and the revenues which flow therefrom—the Major League Baseball Clubs (the "Clubs") who produce the games and copyright the telecasts, or the baseball players (the "Players") whom the Clubs employ to perform in the games. The case arises out of a longstanding collective bargaining dispute between the Clubs and the Players' collective bargaining representative, the Major League Baseball Players Association, concerning the Players' demands for greater levels of compensation, particularly pension benefits. In past years, the Players from time to time asserted in collective bargaining that they had certain "property rights" in their game performances as televised. The Clubs consistently denied this assertion, and routinely telecast Major League Baseball games for approximately 40 years without protest or interference from the Players. In May, 1982, however, the Players Association brought the issue to the fore by sending letters to the Clubs and certain television networks and stations asserting that the game telecasts violated the Players' alleged property rights in their names, likenesses and performances and that the Players were prepared to bring suit to enforce those rights.

As the court of appeals observed, the mailing of these letters "led the parties to move their dispute from the bargaining table to the courtroom." Pet. App. at 2a.[2] There, in the words of the court of appeals, the Players sought a "judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs." Pet. App. at 28a. Thus, it is evident that this case involves essentially a labor dispute over money and bargaining power—a dispute which the Players now seek to transform and elevate into a legal question of great

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2 References to the petitioners' appendix are identified herein as "Pet. App. at ____."

public moment. As will be shown below, the case was correctly decided by the court of appeals and presents no issues of genuine significance beyond the interests of the parties in their collective bargaining relationship.[3]

1. The District Court Proceedings. When the Players' May, 1982 letters threatened interference with the Clubs' long-standing telecasting rights, the Clubs filed a declaratory judgment action in the district court to confirm that they have complete ownership of the rights with respect to the telecasts of Major League Baseball games. After the close of discovery, the Clubs moved for summary judgment on two of the counts of their complaint, the first based on federal copyright law, and the second based on master-servant common law.[4] The district court found that discovery had failed to reveal any genuine issues of material fact and that the Clubs were entitled to judgment as a matter of law on both the master-servant and copyright counts.

With respect to the master-servant count, the district court found that the Clubs own the exclusive right to market the Players' performances in games as the work product of their employment, and that the Clubs may therefore exhibit or license the exhibition of those performances to live or remote audiences. Pet. App. at 41a-44a.

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3 Rather than respond in this brief to the Players' various mischaracterizations of the bargaining history of the parties, the Clubs refer the Court to the opinions of the courts below, which fully address the Players' factual contentions. Suffice to say here that both the district court and the court of appeals found that the so-called bargaining "history" relied upon by the Players had no bearing on the copyright issue now presented for review. *See* Pet. App. at 12a-17a, 40a-41a.

4 The Clubs' complaint included two additional counts based, respectively, upon the contract between the parties and the doctrines of waiver and estoppel. The Clubs did not seek summary judgment on these counts because they involve, by their nature, questions of contract interpretation and issues of fact which may be disputed.

The district court also found that by virtue of this same well-settled common-law principle, codified as the "works made for hire" doctrine in the Copyright Act of 1976 ("the Copyright Act," "the 1976 Act," or "the Act"), the Clubs own the right to market the copyrighted telecasts of Major League Baseball games, including the Players' performances as incorporated therein. The district court further determined that the Players, by asserting the right to control the telecasts of the games, were asserting rights "equivalent" to copyright and that the Players' claims were thus preempted by the Copyright Act. Pet. App. at 36a-41a. The district court concluded its opinion by stating that the parties were "left to their bargaining strategies" to resolve how much Major League Baseball revenue, from whatever source derived, should remain with the Clubs and how much should be traded to the Players in exchange for their game performances. Pet. App. at 49a.

2. The Court of Appeals Proceedings. On appeal, the Seventh Circuit affirmed the district court's finding that there were no issues of fact precluding summary judgment, and affirmed that the Clubs were entitled to judgment on the copyright count. The court of appeals found that the game telecasts were copyrightable "works made for hire" to which the Players contribute their performances within the scope of their employment. Pet. App. at 5a-11a. As did the district court, the court of appeals also found that the Players' claims of a right to control the telecasts of the games were equivalent to a claim of copyright and thus were preempted. Pet. App. at 18a-28a.

With regard to the master-servant count, the Seventh Circuit vacated the district court's judgment and remanded the matter for a determination as to what law governs the common law issues. The district court was directed on remand to determine the appropriate choice-of-law rule under Illinois conflicts law and to make the factual findings necessary to identify the governing law. Pet. App. at 32a.

Like the district court, the Seventh Circuit recognized that the dispute between the Players and Clubs was essentially a collective bargaining matter. In its opinion, the court of appeals stated that in this litigation, the Players had "attempted to obtain ex post what they did not negotiate ex ante." Pet. App. at 28a. The court of appeals concluded that the Players remained free to attempt to obtain their objectives by bargaining with the Clubs. *Id.*

REASONS FOR DENYING THE WRIT

Although the Players seek to portray this case as presenting an important legal issue, it is evident that the issue decided by the court of appeals has no significance to the public at large. In fact, the declaratory judgment affirmed below does not and could not even purport to resolve the only issue of practical consequence to the parties—the level of compensation of the Players. Rather, the judgment below affects only the negotiating strengths and strategies of the parties in their continued collective bargaining. Given the lack of public significance of the case, review by this Court is unwarranted.

Furthermore, the petition should be denied because the case has been remanded to the district court for further proceedings in connection with the Clubs' master-servant law count. That count furnishes independent grounds for the result here reached, and if the judgment on the count is reinstated by the district court, this Court's determination of the issue now presented would be rendered entirely unnecessary.

Finally, and equally important, the court of appeals' decision conflicts with no decision of this Court or any other court of appeals and was correctly decided. The Players' argument that the federal copyright law does not preempt their publicity rights in their televised performances willfully ignores the "works made for hire" doctrine, which specifically authorizes the Clubs to control the videotaped telecasts of Major League Baseball games in which the Players are hired to perform.

Because the Players claim an independent right to control those telecasts, their claims are preempted, and the court of appeals correctly so found. Nothing in the Seventh Circuit's decision, however, operates to destroy any traditional state law property rights.

I.

THIS CASE PRESENTS NO ISSUE OF PUBLIC IMPORTANCE.

It is well established that for a case to be of sufficient importance to warrant review by this Court, the case must be important "to the public" and not merely important to the particular parties involved in the dispute. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *accord Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955). And the issue presented to this Court must be "beyond the academic or the episodic." *Rice*, 349 U.S. at 74.

The decision in this case can hardly be said to satisfy these criteria. All that the dispute concerns is whether one of the most highly compensated groups of professional athletes in the world can use common law right of publicity claims as a legal lever against their Club employers with which to attempt to negotiate even greater levels of compensation for their services. This kind of garden variety collective bargaining dispute should not occupy the attention of this Court, because any decision by this Court will only lead the parties back to the bargaining table, where they will continue their "on-going struggles" over how to divide the revenues which flow from Major League Baseball. *See* Pet. App. at 49a.

For the same reasons, the outcome of this case will not "directly affect the rights of all professional athletes, as well as other types of professional entertainers," as the Players contend. Petition at 4. As the district court noted below, the

collective bargaining arrangements of other groups of athletes and entertainers reflect merely "the contractual results different performers and their employers have reached through negotiation and hard bargaining." Pet. App. at 45a. Furthermore, because these arrangements "arise from bargaining and compromise, they are not particularly analogous" to the Players' and Clubs' situation. *Id.* The parties in these other entertainment industries will continue to negotiate over the particular economic issues of concern to them, regardless of the decision in this case.

The Players' effort to identify an issue of public importance in this case is totally unavailing. Because of the demonstrable lack of any such issue, this Court should decline review.

II.

THE PROCEEDINGS BELOW HAVE NOT BEEN COMPLETED AND MAY OBVIATE ANY NEED FOR REVIEW.

The petition for certiorari should also be denied because the final disposition of proceedings below may obviate the need for any review by this Court. The Seventh Circuit has remanded the judgment with respect to the Clubs' master-servant common law count. Pet. App. at 32a. The remand was prompted by the fact that although the district court concluded that the Clubs' common law rights precluded the assertion of the Players' publicity rights claims, *see* Pet. App. at 41a-44a, it did not specifically identify the law governing such claims. As a result, the district court was directed upon remand to determine such governing law. Pet. App. at 32a.

The district court has yet to consider this issue upon remand. However, should the district court determine that applicable law supports the Clubs' position, then the Clubs' alternative master-servant law count would provide an independent and adequate ground for fully disposing of this action without the

necessity of addressing the federal copyright law issue. In such event, the writ of certiorari would be improvident. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

Because the court of appeals has "remanded the case, it is not yet ripe for review by this Court." *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). Accordingly, the petition should be denied.

III.

THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS AND WAS CORRECTLY DECIDED.

The Players in their petition do not and cannot contend that the decision of the court of appeals is in conflict with any decision of this Court or any other court of appeals. Rather, the Players assert that the Seventh Circuit's decision should be reviewed by this Court on the grounds that it radically expands the preemptive effect of the Copyright Act, adds "confusion" to the question of the scope of preemption under the Act, and operates to destroy a large body of preexisting state property rights. Petition at 9-11. In so claiming, the Players distort the court of appeals' holding and mischaracterize its impact. As demonstrated below, the court of appeals' decision is neither radical nor confusing, but instead simply follows fundamental copyright law principles in holding that the Clubs, and not their player-employees, have the right to control the copyrighted game telecasts. The court of appeals' preemption analysis is entirely consistent with that adopted by the other courts of appeals, and the decision does nothing to extinguish any state law rights that have been recognized to exist independent of copyright law. As a result, the court of appeals' decision is in no need of review by this Court.

A. The Court Of Appeals Correctly Determined That The Game Telecasts At Issue Here Are "Works Made For Hire."

The central principle of copyright law upon which the court of appeals relied in its decision is the familiar and fundamental "works made for hire" doctrine, which provides that where an employee produces a copyrightable work within the scope of his employment, ownership of all of the rights comprised in the copyright vests in his employer by operation of law.[5]

One of the "basic principles" of copyright law,[6] the "works made for hire" doctrine in the 1976 Copyright Act codified a principle which had long been recognized at common law and in the 1909 Copyright Act, and which has found expression in decisions of this Court and in the courts of appeals for nearly a century. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500-01 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Sawyer v. Crowell Pub. Co.*, 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944). The courts have continued to routinely apply the doctrine under the 1976 Act. *See Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983).

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5 Section 201 of the Copyright Act provides that:

> [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright. 17 U.S.C. § 201(b).

A "work made for hire" is defined simply as "a work prepared by an employee within the scope of his or her employment. . . . " 17 U.S.C. § 101.

Similarly, Section 26 of the 1909 Copyright Act provided that the "author," and hence owner, of a copyrighted work "shall include an employer in the case of works made for hire." Act of March 4, 1909, ch. 320, 35 Stat. 1075.

6 *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5736.

As is evident from these cases, an employer has always been legally free to exploit a copyrighted work produced by an employee within the scope of his employment. In this respect, the 1976 Act did not change existing law. With the addition of the provisions for "simultaneous fixation" of live sports telecasts, the Act simply extended to sports clubs the same rights enjoyed by other owners of copyrighted works, including the rights of an employer in the case of a "work made for hire."[7]

Given the significance of the "works made for hire" doctrine to the issues in this case and to the court of appeals' decision, it is remarkable that the Players virtually ignore it, relegating it to a single passing reference at page 7 of their petition. But the lengths to which the Players have gone in avoiding discussion of this fundamental principle serve only to underscore the untenability of their position. For once it has been determined that an employee has produced a copyrighted work within the scope of his employment, then it will inevitably follow that any claim of right by the employee to control the very work he has created will be foreclosed, absent an express written agreement to the contrary.

Here, both the district court and the court of appeals determined that the Players' performances before television audiences as incorporated in the copyrighted game telecasts are within the scope of their employment. *See* Pet. App. at 10a-11a, 38a. Both courts further determined that the parties had not expressly agreed in writing to assign to the Players the copyright ownership in the telecasts of the games, and that no genuine issue of fact existed in this regard. Pet. App. at 12a-

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7 Before January 1, 1978, the effective date of the 1976 Copyright Act, a live telecast of a baseball game or other sporting event was not subject to federal copyright protection because it was not "fixed" at the time of broadcast to the public. At the urging of the professional sports leagues, including Major League Baseball, Congress corrected this technical problem by adopting the concept of "simultaneous fixation" in the new Copyright Act. Under this concept, a live televised sporting event or other performance is regarded as "fixed" in a tangible medium of expression if it is simultaneously recorded on film or videotape. *See* 17 U.S.C § 101.

17a, 40a-41a. As a result, the Clubs own the copyrighted telecasts as "works made for hire," and no right of publicity claims by the Players can be permitted to interfere with such ownership under federal copyright law.

B. The Court of Appeals Correctly Concluded That The Players' Claims Are Preempted.

Having determined that the telecasts of Major League Baseball games are copyrightable "works made for hire," the court of appeals also correctly proceeded to conclude that the Players' claims of "publicity rights" in their performances as embodied in such works are preempted by the Copyright Act. Indeed, far from constituting a radically expansive interpretation of the preemptive scope of the Copyright Act, the Seventh Circuit's preemption analysis flows naturally and inescapably from the application of the "works made for hire" doctrine discussed above.

With regard to Section 301 of the Copyright Act, the court of appeals found that the Players' publicity rights claims are plainly "equivalent" to copyright since their rights are allegedly violated by the Clubs' exercise of at least one of the exclusive rights set forth in Section 106 of the Act, specifically, the right to perform publicly or to authorize the public performance of the audiovisual works in question. Pet. App. at 23a-25a. In so concluding, the court of appeals applied the same equivalence test which has been adopted by the other circuit courts of appeals—that is, a right is equivalent to copyright if it "is infringed by the mere act of reproduction, performance, distribution or display." Pet. App. at 24a (quoting 1 M. Nimmer, *Nimmer on Copyright* § 1.01[B], at 1-11 (1986)).[8] Thus, it is

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8 *Accord Donald Frederick Evans & Assocs. v. Continental Homes, Inc.*, 785 F.2d 897, 914 (11th Cir. 1986); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985), *cert. denied*, ___ U.S. ___, 107 S. Ct. 86 (1986); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir. 1982), *aff'g in pertinent part*, 496 F. Supp. 408, 443-44 (S.D. Ohio 1980).

evident that the Seventh Circuit did not find preemption based upon "vague notions of similarity" or merely because "both rights [of publicity and copyright] are concerned with commercial exploitation of human activity," as the Players contend. Petition at 17. Rather, the court of appeals made a specific and precise application of the recognized test for equivalence under Section 301 of the Copyright Act.

Despite the correctness of the Seventh Circuit's preemption analysis, the Players argue that the decision below cannot be allowed to stand because it would do away with *all* state law right of publicity claims. *See* Petition at 10-11, 14-16, 18-19. The decision has no such effect, and the Players' protestations of alarm rest on nothing more than a distorted characterization of what this case involves.

The instant case has nothing to do with right of publicity claims to prevent unauthorized uses of the Players' names and likenesses *per se*—a right the Clubs do not contest—but instead involves claims of rights in the very performances which the Players have been employed to render as part of a copyrighted work. The Clubs readily concede, and the court of appeals expressly acknowledged, that the Players' rights of publicity with regard to the merchandising of their names and likenesses on commercial products (such as cereal boxes or chewing gum cards) are not preempted by the Copyright Act, since their names and likenesses are not themselves copyrightable. *See* Pet. App. at 23a n.24. But an employee/performer whose name and likeness is an integral part of his performance for hire in a copyrighted work may not assert control over the exhibition of that work under the guise of the "right of publicity." In such a case the Copyright Act itself, by virtue of the "works made for hire" doctrine, authorizes the employer to "fix" such work and to control its public exhibition to the preclusion of contrary claims by the employee.[9]

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9 Under the Copyright Act, a work is "fixed" when the fixing is done "by or under the authority of the author," which includes the employer in the case of a "work made for hire." 17 U.S.C. § 101.

None of the cases cited by the Players for the proposition that copyright law does not preempt publicity rights involved claims of right in a performance for hire, but instead involved claims by an individual against an independent party acting without color of right, wholly apart from an employment relationship. *See* Petition at 18-19. In such cases preemption is unwarranted, for obviously one cannot make an unauthorized copy of a person's likeness, for example, by taking a surreptitious photograph, then claim to have preempted any right of publicity claims in that likeness merely by copyrighting the photograph. Such cases are inapposite here, however, since the Clubs are not strangers to the Players, but rather are their employers acting under authority of the "works made for hire" doctrine. Accordingly, the Players' publicity rights claims cannot escape preemption, and no review of this straightforward conclusion is necessary by this Court.

C. The Court Of Appeals Correctly Determined That The Players' Performances As Incorporated In The Game Telecasts Are Copyrightable "Works of Authorship."

The only remaining contention advanced by the Players to avoid application of the "works made for hire" doctrine and the inevitable preemption of their claims is that the works produced by them are not "works of authorship." As both the district court and court of appeals recognized, however, this contention is entirely without merit. *See* Pet. App. at 8a n.7, 38a-39a. Every federal court which has considered the issue has held that telecasts of professional sports events are copyrightable "works of authorship," that they qualify for copyright protection as "audiovisual works" within the meaning of Section 101 of the Copyright Act, and that sports clubs own the copyright to the telecasts of their games. *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 534 F. Supp. 533, 534 n.5 (N.D.N.Y), *rev'd on other grounds,* 691 F.2d 125 (2d Cir. 1982), *cert. denied,* 459 U.S. 1226 (1983); *New Boston Television, Inc. v. Entertainment & Sports Programming Network, Inc.*, 215 U.S.P.Q. 755, 756 (D. Mass. 1981); *National Football*

League v. McBee & Bruno's, 621 F. Supp. 880, 885 (E.D. Mo. 1985), *aff'd in pertinent part*, 792 F.2d 726 (8th Cir. 1986); *Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel*, 623 F. Supp. 647, 653 (S.D. Tex. 1985).

The Clubs' copyright ownership of the telecasts of their games, necessarily founded upon the Clubs' "authorship" of the games, has also been confirmed by the Copyright Royalty Tribunal, a federal agency established by Congress under the Copyright Act to distribute royalties to the owners of copyrighted television programming for the cable television retransmissions of their programs. *See* 17 U.S.C. § 111(d); 1979 Cable Royalty Distribution Remand Proceeding, 49 Fed. Reg. 3,899 (1984); 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552, 9,565 (1983). Thus, the court of appeals' decision as to the copyrightability of the game telecasts is consistent with congressional, administrative and judicial confirmations of the Clubs' copyright ownership.

Notwithstanding the Clubs' conceded copyright ownership of the game telecasts, the Players attempt to argue that their own contributions to these audiovisual works—their performances incorporated therein—are not "works of authorship" because they are insufficiently "creative" or "aesthetic." Petition at 21. The court of appeals rightly rejected this argument as contrary to the long-established principle that only a modicum of creativity is required for a work to be copyrightable, and as contrary to the expressed congressional intention that the term "works of authorship" does not include any requirement of aesthetic merit. *See* Pet. App. at 8a n.7. As Justice Holmes once stated:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits . . . . if they command the interest of any public, they have a commercial value—it would be bold to say they have not an

> aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).[10]

Indeed, the Players' performances are no different from contributions made by an actor to a motion picture, or a singer to a copyrighted sound recording, all of which are regarded as copyrightable "authorship" making up part of the total authorship for the ultimate fixed work.[11] *See* 1 M. Nimmer, *supra*, § 2.04[B], at 2-40 ("the cameraman, *the actors* (and others) create an audiovisual work . . . ") (emphasis added). Where the contributions of such performers are rendered as employees for hire, copyright ownership thereof will vest with their respective employers. *Id.* § 2.10[A], at 2-149-50. Thus, the Players' final argument for avoiding preemption of their claims is of no avail.

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10 In *National Football League v. McBee & Bruno's*, *supra*, the court observed that the "work of authorship" which is recorded in a telecast of a professional sports game is not merely the work of the cameraman or telecast director, but most importantly *the game itself*:

> It is the aria from Puccini as sung by Pavarotti at Kennedy Center and the performance of Aida at the Metropolitan and the football game between the Cardinals and another team that the television viewers take delight in . . . The fixation, therefore, is the "original 'works' of authorship" which is the opera, the dance ensemble . . . *and the game*.

621 F. Supp. at 886 (emphasis added). Moreover, in recognizing the Clubs' common law property rights as the creators of their games, courts have acknowledged the many creative and dramatic elements which the games comprise, not least of which are the "original and unique performances of highly skilled performers." *National Exhibition Co. v. Fass*, 143 N.Y.S.2d 767, 770 (Sup. Ct. 1955); *see Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Liberty Broadcasting System v. National League Baseball Club of Boston, Inc.*, 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1952).

11 As noted in the House Committee Report to the 1976 Act:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both *on the part of the performers whose performance is captured* and on the part of the record producer

CONCLUSION

As demonstrated above, the Seventh Circuit's decision is correct, it conflicts with no decision of this Court or any other court of appeals and it presents no issue of importance to the public. It thus presents no circumstances justifying review by this Court, particularly where the case has been remanded for further proceedings which may well obviate the need to consider the question presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5669 (emphasis added); *see also id.* at 52, 1976 U.S. Code Cong. & Ad. News at 5665-66 (listing "improvisations" and "performances" as works of authorship).

APPENDIX

RULE 28.1 LISTING

1. Atlanta National League Baseball Club, Inc.

   Parent: Turner Broadcasting System, Inc.

   Subsidiaries: Atlanta Braves, Inc., Atlanta Chiefs, Inc., Braves Productions, Inc., The Stadium Club, Inc., Stadium Restaurants, Inc.

   Affiliates: Atlanta Hawks, Inc., C.N.N., MGM Entertainment Co., RET Corp., Super Station Inc., TBS Productions, Inc., Turner Broadcasting Sales, Inc., Turner Marketing, Inc., Turner Music Publishing, Inc., Turner Music Service, Inc., Turner Network Television, Inc., Turner Omni Ventures, Inc., Turner Program Services, Inc., Turner Reciprocal Advertising Corp., Turner Teleport, Inc., Turner Television Stations, Inc.

2. Chicago National League Ball Club, Inc.

   Parent: Tribune Co.

   Affiliates: Chicago Tribune Co., Green Sheet Publications, Inc., News Building, Inc., News & Sun-Sentinel Co., New York News, Inc., Sentinel Communications Co., Sunbelt Publishing Co., Tribune Broadcasting Co., Tribune Cable Communications, Inc., Tribune Na'ional Marketing Co. Tribune Newspapers West, Inc.

3. John E. Fetzer, Inc. (Detroit Tigers)

   Parent: TISM, Inc.

   Affiliates: Domino's Pizza, Inc.

4. St. Louis National League Baseball Club, Inc.

   Parent: Anheuser-Busch Companies, Inc.

Affiliates: Anheuser-Busch, Inc., Anheuser-Busch International, Inc., Busch Agricultural Resources, Inc., Busch Creative Services Corp., Busch Entertainment Corp., Busch Industrial Products Co., Busch Properties, Inc., Campbell Taggart, Inc., Civic Center Corp., Container Recovery Corp., Eagle Snacks, Inc., Manufacturers Railway Co., Metal Container Corp., Metal Label Corp., St. Louis Refrigerator Car Co.